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No. 88-1039

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM FRENCH SMITH, *et al.*,
Petitioners,

v.

ANTHONY J. PRISCO, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an interlocutory appeal was available to petitioners from a finding that they lacked qualified immunity in an action for both damages and injunctive relief.

2. Whether petitioners were entitled to qualified immunity when they were alleged to have used the Witness Protection Program to deprive respondent of his constitutional right to visit and communicate on any regular basis with his daughter, and when both lower courts found that the officials' actions contravened: (1) cases from this Court recognizing generally respondent's due process right to maintain a parent-child relationship; and (2) lower court cases recognizing a due process right to timely notice and an opportunity to be heard in connection, specifically, with this type of official action.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 851 F.2d 93. The opinion of the district court (Pet. App.-15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1988. A petition for rehearing was denied on August 24, 1988 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on December 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Three years after their marriage, Maria and Anthony Prisco had a daughter, Lauren. Pet. App. 3a. Even before the marriage officially dissolved, in March, 1983, Mr. and Mrs. Prisco entered into an agreement whereby Maria would retain custody, while Anthony would regularly visit the child. *Id.* Respondent regularly did so. *Id.*

However, when Mrs. Prisco remarried, in August, 1983, her new husband, Michael Morris, had already been cooperating with an investigation by the Federal Bureau of Investigation into drug-trafficking. *Id.* Within one month, the entire family, with the exception of Mr. Prisco, Lauren's natural father, were removed from their home in Philadelphia and shortly thereafter, in October, were placed in the Federal Witness Protection Program. See 18 U.S.C. Secs. 3521-28 (Supp. IV 1986) ("the Program").

When his daughter and former wife suddenly disappeared, Mr. Prisco hired a private investigator to locate them. *Id.* When the investigator later reported that Mr. Prisco's family had been removed as part of the Program, Mr. Prisco began efforts to resume visitation, or alternatively, obtain custody. Although the Marshall's Service taking responsibility for Lauren's "welfare" purportedly made her available for visitation, Mr. Prisco was able to visit her on only two occasions. Both times, any ordinary or meaningful parent-child relationship was impossible because of the strict limitations placed on the visit. See Pet. App. 4a.

On June 29, 1987, Mr. Prisco was successful in winning primary custody over his daughter. Even when the Order giving him custody was vacated months later, on October 2, 1987, Mr. and Mrs. Prisco agreed to share custody. *Id.* 4a.

2. The instant lawsuit was filed by Mr. Prisco on November 21, 1985 in the United States District Court

for the Eastern District of Pennsylvania. On October 15, 1987, the District Court (Scirica, J.) denied petitioners' motion for summary judgment which was based principally on the ground that they were entitled to qualified immunity from this type of claim. *Id.* at 12a. It found, specifically, that a disputed material issue of fact existed as to whether the visitation afforded respondent was sufficient. *Id.* at 16a. Similarly, the court rejected petitioners' arguments that the law was sufficiently in flux, as to Mr. Prisco's due process interests in visiting his daughter, when the decision to remove them was made. See *id.* at 17a-18a.

3. The court of appeals for the Third Circuit agreed with the District Court. However, it refused to reach the merits of the qualified immunity defense with respect to all but one of the petitioners. While recognizing that a qualified immunity defense is normally capable of review on an interlocutory appeal, it held that this rule was inapplicable where, as here, the plaintiff was not seeking simply monetary damages, but also injunctive relief.

Nevertheless, the court reached the merits of the qualified immunity defense with respect to the claim against petitioner Smith. That defendant, the court recognized, was in a different position since he was no longer in government service, and accordingly, no prospective relief was sought as to him. *Id.* at 8a.

With respect to the merits of petitioner Smith's qualified immunity defense—that he was immune from liability because the law was sufficiently doubtful when Mr. Prisco's family was removed from their home and placed in the Program—the court agreed with the district court. The court observed that Mr. Prisco's interests were recognized generally in a "long line of cases extending over sixty-five years." *Id.* at 9a. Such cases, the court reasoned, removed any "serious[]" argument that "Prisco's substantive interest and procedural entitlement to notice and hearing were doubtful in August of 1983 when

Lauren was removed from Philadelphia, and in October of 1983 when she was placed in the Witness Protection Program." *Id.* at 10a. The court further held that law was not in doubt as applied to those officials who caused her removal, *id.*, noting that the two cases involved facts substantially similar to those at bar. See *id.* at 10a-11a.

ARGUMENT

In thorough opinions upon which respondent relies, the district court and the court of appeals rejected petitioners' claims. We recognize that a conflict among the courts of appeals exists with respect to the appealability of an order denying a claim of qualified immunity. Consequently, we acknowledge that this claim might ordinarily be appropriate for review by this Court. Nevertheless, it is appropriate to deny the petition for another reason, or alternatively, to grant review only as to the first question set forth in the petition.

1. Respondent does not dispute that a conflict exists with respect to the appealability of a determination that qualified immunity exists. The holding of the court of appeals is in conflict at least with that of the Eleventh Circuit in *Marx v. Gumbinner*, 855 F.2d 783, 786-788 (1988). However, as shown below, petitioners err in stating that this issue is of any practical importance to the result reached in this case.[1]

As noted above, the court of appeals refused to reach the qualified immunity defense of petitioners who were still in government service on the ground that such issues were not appealable under this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). However, there is no reason (and none has been suggested

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[1] We are cognizant of the government's arguable interest in having the appealability issue resolved even though it would not impact in any way on the outcome in this case. If such an interest is sufficient to warrant review by this Court, and we doubt that it is, then the appropriate course would be to grant review only with respect to the first issue set forth in the petition.

by petitioners) why those parties' rights to assert such a defense would be different from that of petitioner Smith—whose qualified immunity defense *was* fully decided by the court of appeals. Consequently, unless the lower courts' determination regarding, specifically, the merits of that defense are properly the subject of review by this Court, no reason exists to grant the petition.

2.a. It is plain from the petition that petitioners have failed to identify any factor regarding their second issue warranting relief or even examination by this Court. Essentially, petitioners claim merely that the court of appeals erred in rejecting the qualified immunity defense on two grounds: (1) the pleadings failed to aver any personal involvement on the part of either official, triggering responsibility on their part, and (2) both lower courts misconstrued the case law existing when the decision was made to remove Mr. Prisco's daughter in holding that the law was sufficiently clear to impute liability to petitioners. Neither issue warrants review by this Court.

Petitioners' entire argument regarding the merits of their qualified immunity defense depends upon their ability to establish the state of the law "at the time that Lauren Prisco and her mother were admitted into the Witness Protection Program. . . ." Pet. at 17. In fact, because their argument depends upon an analysis of the law at that precise point, petitioners have limited themselves to a discussion of five cases which arguably control that narrow question. It is doubtful whether any determination of that issue by this Court would have any significance to anyone other than the parties to this case.[2]

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[2] The issue framed by petitioners' argument is even more narrow. Petitioners essentially admit that the second question framed in their Petition can be resolved by narrowly deciding whether language in *Leonhard v. Mitchell*, 473 F.2d 709 (2d Cir.), cert. denied, 412 U.S. 949 (1973) (Leonhard I), and *Leonhard v. United*

b. Moreover, petitioners err on the merits of their Petition in arguing that they are entitled to qualified immunity. Petitioners erroneously claim that they are entitled to such protection on the theory that case-law arguably was uncertain as to the existence of respondent's constitutional claim.

Essentially, petitioners argue that they should not have known that their conduct—depriving an entirely innocent father of the ability to see or even communicate with his daughter on any regular basis—was wrong, despite the fact that one decision issued by a court of appeals squarely held that such conduct was actionable, the failure to allow any sort of notice to respondent violated the internal regulations of the Witness Protection Program, see Pet. at 4, and finally such conduct, on its face, was entirely unreasonable.

The only support for their claim essentially comes from the decision in *Leonhard I*, *supra*. First, both lower courts correctly construed that case as offering only mere *dicta* on the question of whether a constitutional claim may arise from the conduct in issue here. Second, while chiding the court of appeals for disregarding the "unique circumstances" in various cases, see Pet. at 19, petitioners do precisely that in arguing that the decision in *Leonhard I*, is controlling. Petitioners nowhere mention that the parent in that case who had legal custody believed that the children's safety "required that they no longer be visited by their natural father." 473 F.2d at 714. In denying relief, the court in *Leonhard I* took pains to point out that its decision was

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States, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981) (Leonhard II), is mere *dicta* or constituted a holding, or alternatively, whether *Leonhard I* was undermined by the later decisions in *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Santosky v. Kramer*, 455 U.S. 745 (1982). Pet. at 18-19. Clearly, such narrow issues have little importance beyond this case.

mandated by the "extraordinary factual posture of this case." 473 F.2d at 714.1.[3] No such showing was made or even suggested below.

Consequently, there is no reason to conclude that the second question posed by the Petition warrants review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied, or in the alternative, this Court should grant the Petition only with respect to the first issue set forth in the Petition.

Respectfully submitted,

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[3] Petitioners' claim that the pleadings were inadequate to establish personal involvement similarly is insufficient to warrant review by this Court. Even assuming *arguendo* that such a requirement exists, and that some obligation exists to plead with particularity those facts showing personal involvement on the part of officials, and that this rule was violated below, which assumptions we dispute, that hardly means that petitioners would be entitled to any relief at this juncture, other than a remand to determine whether Mr. Prisco should be entitled to amend his Complaint to allege such facts. Clearly, such issues do not warrant review by this Court.